STATE OF MICHIGAN

COURT OF APPEALS

SCOTT D. BAIN,

Plaintiff-Appellant/Cross-Appellee,

v

BAKER'S CHOICE COMPANY, WAYNE E. SONKIN, INDEPENDENT BAKERY DISTRIBUTORS, FAMILY BAKED GOODS LTD,

Defendants,

and

MICHIGAN FEDERAL CREDIT UNION,

Defendant/Cross-Plaintiff/Appellee/Cross-Appellant,

and

MICHIGAN NATIONAL BANK and FIRST OF AMERICA BANK SOUTHEAST MICHIGAN,

Defendants/Cross-Defendants/Appellees,

and

FIRST OF AMERICA BANK ANN ARBOR, FIRST OF AMERICA BANK CORPORATION, and FIRST OF AMERICAN BANK MICHIGAN,

Defendants-Appellees,

and

MICHAEL KETSLAKH and K.O.

UNPUBLISHED
July 20, 2001

No. 215274
Genesee Circuit Court
LC No. 96-051256-CK

DISTRIBUTORS, INC.,

Third-Party Defendants.

SCOTT D. BAIN,

Plaintiff-Appellant/Cross-Appellee,

v

FIRST OF AMERICA BANK NA, FIRST OF AMERICA BANK ANN ARBOR, FIRST OF AMERICA BANK SOUTHEAST MICHIGAN, FIRST OF AMERICA BANK CORPORATION, FIRST OF AMERICA BANK MICHIGAN, and MICHIGAN NATIONAL BANK,

Defendants-Appellees,

and

MICHIGAN FEDERAL CREDIT UNION,

Defendant-Appellee/Cross-Appellant.

No. 216836
Genesee Circuit Court
LC No. 98-062463-CK

Before: Sawyer, P.J. and Murphy and Saad, JJ.

PER CURIAM.

In these consolidated cases, plaintiff appeals as of right from orders dismissing his claims following the trial court's grant of defendants' motions for summary disposition, and we affirm. Defendant Michigan Federal Credit Union (MFCU) also cross-appeals from an order denying its motion for summary disposition, and we reverse.

I. Facts

On July 30, 1993, plaintiff entered a written Distributor Agreement with KO Distributors. The agreement states that, on March 3, 1993, Baker's Choice and KO Distributors entered a Master Distributor Agreement which authorized KO Distributors to enter contracts with sub-distributors to deliver Baker's Choice snack food products. The Distributor Agreement further

provides that KO Distributors appointed plaintiff as the exclusive sub-distributor for ten years and for a territory including Saginaw and Livingston Counties. The agreement also states that, "[a]s consideration for the exclusive right to distribute the Product in the Territory," plaintiff shall pay KO Distributors a fee of $20,000 by certified or cashier's check. Plaintiff and Michael Ketslakh, president of KO Distributors, signed the agreement.

On August 6, 1993, MFCU issued a teller's check[1] to plaintiff, made payable to Baker's Choice. MFCU debited plaintiff's credit union account for the funds, which plaintiff deposited from a loan he obtained for this purpose, and the funds were then to be drawn from MFCU's account at Michigan National. On or about the same date, plaintiff delivered the check to Ketslakh. Ketslakh asked plaintiff to sign the back of the check and plaintiff did so. Thereafter, Ketslakh also signed the back of the check and wrote "KO Distributors." Ketslakh then deposited the check in KO Distributors' own account at First of America. First of America then cashed the check at Michigan National which, in turn, debited MFCU's account for the $20,000. Plaintiff maintains that he believed Ketslakh was an agent of Baker's Choice and that Ketslakh would deliver the check to Wayne Sonkin, president of Baker's Choice, to be cashed to pay for plaintiff's exclusive delivery route.

Plaintiff delivered Baker's Choice products until June 1994, when he discovered that other distributors, specifically Independent Bakery Distributors and Family Baked Goods, were delivering Baker's Choice snack foods in what he thought was his territory. The record indicates that KO Distributors became defunct in 1994 and Ketslakh moved to California.

II. Procedural History

On October 1, 1996, plaintiff filed a complaint against Baker's Choice, Sonkin, Independent Bakery Distributors and Family Baked Goods. Plaintiff claimed that Baker's Choice breached the Distributor Agreement and interfered with the economic relationship between plaintiff and KO Distributors. Plaintiff also claimed he discovered that Ketslakh did not have the authority to sell exclusive distribution rights for Baker's Choice, but that Ketslakh and Sonkin made false or negligent representations on which plaintiff relied in paying $20,000 for the exclusive territory.[2]

On April 21, 1997, plaintiff filed a supplemental first amended complaint and added allegations that he relied on representations by MFCU and Michigan National that the teller's check would be paid only to Baker's Choice, but that he learned on or about March 3, 1997, that

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[1] A teller's check, like a cashier's check, guarantees the availability of funds in the amount for which the check is issued. A teller's check is different than a cashier's check in that, for a teller's check, the drawer and drawee are different banks, whereas, for a cashier's check, the drawer and drawee are the same. Here, MFCU was the drawer of the check, but the drawee of the check was Michigan National, which withdrew the funds from MFCU's account at First of America when the check was presented at First of America for deposit.

[2] Plaintiff's claims against Baker's Choice, Sonkin, Independent Bakery Distributors and Family Baked Goods are not at issue on appeal.

Baker's Choice never received the money. Plaintiff also claimed that the defendant banks and MFCU (1) violated Michigan's version of the Uniform Commercial Code, MCL 440.3101, *et seq.*, (2) negligently cashed the check, (3) breached their contract with plaintiff, and (4) are strictly liable for breach of statutory warranties.

On July 28, 1997, Michigan National and First of America filed a motion for summary disposition pursuant to MCR 2.116(C)(7), and argued that plaintiff's claims were barred by the three-year statute of limitations. On August 19, 1997, MFCU filed a motion for summary disposition on statute of limitations grounds, among other arguments. The trial court granted Michigan National and First of America's motion and denied MFCU's motion.

On November 5, 1997, plaintiff filed a motion for summary disposition against MFCU pursuant to MCR 2.116(C)(9) and (C)(10).[3] MFCU also filed a motion for reconsideration on November 18, 1997,[4] arguing that the trial court's grant of summary disposition to Michigan National and First of America based on the three-year statute of limitations should also apply to plaintiff's claims against the credit union.[5] However, the trial court ruled that it did not err in denying MFCU's motion for summary disposition and agreed with plaintiff's claim that this is a contract action and does not fall within the UCC and, therefore, a six-year statute of limitations applies. Further, the court stated that, even if a three-year statute of limitations applies to plaintiff's claim, the time did not begin to run until plaintiff discovered that the check was improperly cashed.

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[3] Plaintiff argued that MFCU failed to assert a valid defense, particularly after the trial court rejected the credit union's statute of limitations claims. Further, plaintiff argued that, as a matter of law, MFCU owed plaintiff a duty to make no payment out of his account without his authorization and that no evidence showed that the $20,000 payment was made to Baker's Choice, plaintiff's named payee. MFCU responded on November 24, 1997, maintaining that its statute of limitations defense was valid, that plaintiff had no contract with the credit union and that any duty it owed to plaintiff was discharged when First of America cashed the check.

[4] MFCU filed a cross-claim against Michigan National and First of America in November 1997, alleging, among other things, that, because First of America deposited the check and Michigan National drew the funds from MFCU's account, that MFCU was not responsible for verifying the endorsement.

Baker's Choice filed a third-party complaint for fraud and breach of contract against KO Distributors and Ketslakh and on February 17, 1998, Baker's Choice filed a cross-claim against First of America, alleging conversion for accepting the endorsement of Ketslakh and for delivering payment to KO Distributors. Baker's Choice also alleged First of America was negligent for accepting the endorsement when KO Distributors had no authority to act on behalf of Baker's Choice. Baker's Choice and Sonkin settled with First of America for $5,000 and plaintiff challenged the settlement as prejudicial to his claims. The trial court entered a stipulation and order to dismiss the claims between Baker's Choice and First of America on August 19, 1998, though the record does not reflect whether the court approved the above settlement.

[5] Michigan National and First of America filed a motion in support of MFCU's statute of limitations argument on November 24, 1997.

According to the parties, the trial court held an unrecorded hearing on January 28, 1998, at which it granted MFCU's motion for summary disposition and denied plaintiff's motion for summary disposition. At a hearing on February 9, 1998, the trial court allowed the parties to reiterate their arguments for the record and ruled that MFCU should be dismissed because it did not cash the check and because it did not have a contract with plaintiff. Thereafter, plaintiff filed a motion for reconsideration[6] and to reinstate his claims against Michigan National and First of America which the trial court ultimately denied.[7]

On February 19, 1998, plaintiff filed another action against First of America, Michigan National and MFCU. Plaintiff alleged that defendants were liable for conversion because, despite his continued ownership of the $20,000 teller's check, defendants knowingly failed to return his money. Thereafter, plaintiff amended the complaint and stated that he demanded the return of his money from Michigan National and MFCU on April 1, 1997, that he attempted to cancel the teller's check at Michigan National on April 16, 1998, and that he attempted to cancel the check at MFCU on April 23, 1998, but all three defendants refused to return the funds.

MFCU, First of America and Michigan National filed motions for summary disposition and argued that plaintiffs' claims are barred by res judicata and the statute of limitations and that plaintiff failed to assert any claim against First of America. The trial court granted the motions and ruled that plaintiff's claim was barred because the three-year statute of limitations began to run on August 9, 1993, when Ketslakh deposited the check in the KO Distributors account. However, the trial court ruled that res judicata did not bar plaintiff's claims and, on December 21, 1998, the trial court entered an order dismissing plaintiff's claims on statute of limitations grounds.

III. Analysis

A. Statute of Limitations Bars Plaintiff's Claims Against First of America and Michigan National

This Court reviews de novo a trial court's grant of summary disposition pursuant to MCR 2.116(C)(7). *McKiney v Clayman*, 237 Mich App 198, 200-201; 602 NW2d 612 (1999).[8]

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[6] Following a settlement conference, the trial court entered an order on March 23, 1998, staying proceedings concerning all claims involving First of America, Michigan National, MFCU, Independent Bakery, and Family Baked Goods except plaintiff's motion for reconsideration of the cross motions between plaintiff and MFCU and plaintiff's motion to reinstate his claim against First of America and Michigan National. It appears that the trial court entered the order to first determine the whether and to what extent an agency relationship existed between Baker's Choice and Ketslakh/KO Distributors to determine the liability of all the parties.

[7] On June 25, 1998, pursuant to a settlement, the trial court entered an order dismissing plaintiff's claims against Baker's Choice, Sonkin, Independent Bakery and Family Baked Goods. The trial court also entered an order dismissing Baker's Choice's third-party complaint against Ketslakh, pursuant to a settlement.

[8] In reviewing a motion under this rule, the Court "consider[s] all documentary evidence (continued…)

Plaintiff argues that the trial court erred in granting summary disposition to Michigan National and First of America because the applicable statute of limitations is six years for a breach of contract claim, not three years. To support his claim, plaintiff relies, in part, on *Jerman v Bank of America*, 7 Cal App 3d 882 (1970) and *Lewis v Telephone Employee's Credit Union*, 87 F3d 1537 (CA 9, 1996), for the proposition that defendants had an implied contract with him for which a six-year statute of limitations applies. See MCL 600.5807(8).

Contrary to plaintiff's contention, however, *Jerman* and *Lewis* apply to breach of contract claims by a plaintiff against a bank that *sells* a cashier's or teller's check. Accordingly, these cases do not support plaintiff's argument that a six-year statute of limitations should apply to his claims against Michigan National and First of America.

Plaintiff makes only a cursory attempt to apply *Lewis* to his claims against Michigan National and First of America by arguing that, because he endorsed the check, he has a direct cause of action against both banks. However, plaintiff merely observes that, in *Lewis*, the Ninth Circuit Court of Appeals ruled that the plaintiffs did not have a valid cause of action for conversion against the banks which cashed the teller's checks because a remitter is not a party to the check itself and has no property rights in it unless he endorses it himself. Plaintiff reasons that, because he endorsed the check, he has a direct cause of action against Michigan National and First of America pursuant to *Lewis*.

Regardless whether *Lewis* supports this contention, the argument has no bearing on plaintiff's claim that the trial court erred by basing its ruling on the statute of limitations. If anything, plaintiff's argument supports Michigan National and First of America's argument that plaintiff's suit against them is one for conversion. This Court has ruled that a payee suffers an "injury to property" when a bank cashes a check with a forged endorsement. *Continental Cas Co v Huron Valley Nat Bank*, 85 Mich App 319, 323-324; 271 NW2d 218 (1978); *Insurance Co of N America v Manufacturers Bank of Southfield, NA*, 127 Mich App 278, 281-282; 338 NW2d 214 (1983) ("ICNA"). While Ketslakh did not forge the signature of Baker's Choice or its president, he fraudulently obtained the check by posing as an agent of Baker's Choice and deposited the check in his own account rather than delivering it to Baker's Choice. Thus, plaintiff suffered an injury to property similar to the cashing of a forged instrument. Accordingly, and assuming that plaintiff has a property interest in the teller's check by virtue of his endorsement, plaintiff's claim is one for conversion of a negotiable instrument. *Id*.

Claims for conversion of a negotiable instrument arise under the former MCL 600.5805(8), which provides a three-year statute of limitations. *Continental, supra*, 85 Mich App 323-324.[9] This Court has held that, even if a plaintiff asserts a claim for breach of implied

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submitted by the parties and accept[s] as true the plaintiff's well-pleaded allegations, except those contradicted by documentary evidence." *Id*. at 201. For motions brought on statute of limitations grounds, the court "view[s] the uncontradicted allegations in the plaintiff's favor and ascertain[s] whether the claim is time-barred as a matter of law." *Id*. "Whether a cause of action is barred by the statute of limitations is a question of law that we also review de novo." *Id*.

[9] Defendants also cite MCL 440.3118(4) of the UCC negotiable instruments article which states:

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contract as plaintiff attempts in this case, the action is still controlled by the three-year statute of limitations for an injury to property. *ICNA, supra*, 127 Mich App 282-283; see also *Huhtala v Travelers Ins Co*, 401 Mich 118; 257 NW2d 640, 644 (1977) (a six-year breach of contract limitations period applies to actions for damages to persons or property only if the suit is based on an express promise, and not a duty implied by law). Accordingly, plaintiff's attempt to label this a contract claim is unavailing and a three-year statute of limitations applies pursuant to MCL 600.5805(8).

Plaintiff also claims that, regardless of which statute of limitations applies, the statute did not begin to run until he knew or should have known that the check was paid to Ketslakh/KO Distributors instead of Baker's Choice. In support of this argument, plaintiff primarily relies on *Benge v Michigan National Bank*, 341 Mich 441; 67 NW2d 721 (1954); superseded by statute as stated in *Siecinski v First State Bank of East Detroit*, 209 Mich App 459; 531 NW2d 768 (1995). We find the reasoning in *Benge* unpersuasive because it is based on a now-repealed statute and is factually different from this case.[10]

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> An action to enforce the obligation of the acceptor of a certified check or the issuer of a teller's check, cashier's check, or traveler's check must be commenced within 3 years after demand for payment is made to the acceptor or issuer.

This subsection appears to control plaintiff's claim with regard to his contention that the banks failed to cash the check according to its terms. However, as plaintiff notes, the statute was enacted on September 30, 1993, after Ketslakh presented the check to First of America for deposit on August 9, 1993. "Courts have consistently held that the applicable statute of limitations is that in effect at the time a plaintiff's cause of action arises." *Eberhard v Harper-Grace Hospitals*, 179 Mich App 24, 30 n 2; 445 NW2d 469 (1989). Generally, unless the Legislature provides otherwise, a statute of limitations does not apply retroactively "if it would abrogate or impair a vested right." *Gorte v Department of Transp*, 202 Mich App 161, 167-168; 507 NW2d 797 (1993). Accordingly, that portion of the UCC statute does not apply to plaintiff's claim. Nonetheless, as discussed above, because plaintiff's claim against Michigan National and First of America is one for injury to property, MCL 600.5805(8) states the statute of limitations for conversion. *Continental, supra*, 85 Mich App 323-324; see also *Menichini v Grant*, 995 F2d 1224, 1229 (CA 3, 1993).

[10] In *Benge*, the plaintiff's husband forged her signature to cash checks from her account at Central National. Our Supreme Court ruled that Central National owed the plaintiff a "duty to make no payments out of her account except on her order." *Benge, supra*, 341 Mich 445. Relying on the repealed MCL 487.661, the Court held that "[a] depositor who does not receive knowledge, or the means of knowledge, that forged checks have been paid by his bank and charged against his account may not be denied the right to recover because of his failure to give the notice contemplated by the statute." *Id*. at 451. Because the plaintiff's husband prevented her from seeing the canceled checks, the Court concluded that plaintiff timely notified Central National about the forgeries.

As Michigan National and First of America observe, the statute addressed in *Benge*, MCL 487.661, was superseded by the UCC prior to the events in this case. *Siecinski, supra*, at 462-463. As the *Siecinski* Court noted, "[u]nder the UCC … it is no longer necessary for the bank to

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Michigan National and First of America's argument against the "time of discovery" rule is more persuasive. Our Court addressed this issue recently in *Brennan v Jones & Co*, 245 Mich App 156; 626 NW2d 917 (2001). In *Brennan*, the plaintiff sued Jones for conversion of stock certificates that were negotiated over forged signatures. *Id*. at 157. The trial court granted summary disposition to defendant Jones on statute of limitations grounds and the plaintiff appealed, arguing that the three-year statute of limitations should not begin to run until they discovered the conversion. *Id*. Our Court observed that, pursuant to MCL 600.5827,"the limitation period begins to accrue 'at the time the wrong upon which the claim is based was done regardless of the time when damages results.'" *Id*. at 158. The last certificate was negotiated in 1990, but the plaintiffs claimed they did not discover the conversion until 1995, approximately two years before they filed suit. *Id*. at 159.

This Court noted that our Courts have applied a "time of discovery" rule in cases involving medical malpractice, negligent misrepresentation and certain products liability cases, because "the concern for protecting defendants from 'time-flawed evidence, fading memories, lost documents, etc.' is less significant in these cases." *Id*. at 159-160, quoting *Larson v Johns-Manville Sales Corp*, 427 Mich 301, 309; 399 NW2d 1 (1986) and *Eagle-Picher Industries, Inc v Cox*, 481 So2d 517, 523 (Fla App, 1985). However, our Court opined:

> We conclude that the strong public policies favoring finality in commercial transactions, protecting a defendant from stale claims, and requiring a plaintiff to diligently pursue his claim outweigh the prejudice to plaintiffs and militate against applying the discovery rule in the context of commercial conversion cases. The majority of states have also refused to apply the discovery rule in commercial conversion cases. [*Id*. at 160 (citations omitted).]

This reasoning is echoed in cases cited by defendants, including *Menichini v Grant*, 995 F2d 1224 (CA 3, 1993), in which the plaintiff's bookkeeper forged his signature on several checks made out to the plaintiff's company, Best Legal Services, and deposited the checks into her personal account at Mellon Bank. *Id*. at 1227-1228. The bookkeeper concealed her activities for twenty months, during which time she forged and deposited 150 checks. *Id*. at 1228. The

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mail statements and items to the customer: it may also hold them pursuant to the customer's request, or 'otherwise in a reasonable manner make them available to the customer.'" *Id*. at 463, quoting *Benson v Comerica Bank*, 177 Mich App 517, 521; 442 NW2d 284 (1989).

Benge is also inapplicable because canceled teller's checks are not mailed to the purchaser/remitter and, therefore, the former statute would not apply to these facts. A canceled teller's check would be sent back to the seller, because it is drawn on the seller's account. The check would not be sent to plaintiff, the remitter, because his account was debited upon purchase of the check. The reasoning of the court in *Benge* is that, where required, a depositor must have the opportunity to see the checks to verify the endorsement. Because this verification is not applicable to the remitter of a teller's check, the reasoning is not persuasive to support plaintiff's contention that the statute of limitations was tolled until he discovered that the check was paid to KO Distributors.

district court granted judgment against Mellon Bank for conversion. *Id*. On appeal, Mellon Bank argued that Menichini's claim was barred by the two-year statute of limitations for conversion under Pennsylvania law and Menichini argued that the statute did not begin to run until he discovered the illegal activity. *Id*. at 1228.

In considering whether a discovery rule should apply, the Third Circuit Court of Appeals observed that no Pennsylvania cases applied the discovery rule to actions for check fraud. The Court looked outside the state and concluded that

> Although a few courts apply the discovery rule to negotiable instrument theft on essentially equitable grounds, the tide of case law runs strongly against this approach. Where a party not engaging in fraudulent concealment asserts the statute of limitations defense, most courts have refused to apply the discovery rule to negotiable instruments, finding it inimical to UCC policies of finality and negotiability. [*Menichini*, *supra*, 995 F2d 1229-1230 (citations omitted).]

The Court found that a strict application of the statute of limitations was superior to a discovery rule and opined:

> We find this approach convincing and believe it advances the Code objectives of negotiability, finality, and uniformity in commercial transactions. As courts have long recognized, … the utility of negotiable instruments lies in their ability to be readily accepted by creditors as payment for indebtedness. Checks must be transferable. Consequently, "in structuring the law of checks we ... seek to enhance the negotiability of commercial paper so that it may play its role as a money substitute." Negotiability requires predictable and rapid collection through payment channels.
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> Closely related to negotiability are commercial finality and certainty. "The finality of transactions promoted by an ascertainable definite period of liability is essential to the free negotiability of instruments on which commercial welfare so heavily depends."
>
> Vigorous application of the statute of limitations is a reasonable means of achieving certainty in commercial transactions. Indeed, in the context of bank collections, the Code explicitly mandates "mechanical" application of the statute of limitations notwithstanding the customer's failure to discover a forged indorsement within the relevant limitations period, 13 Pa.Cons.Stat.Ann. §4406 (placing absolute three-year limitation on a customer's right to bring a breach of warranty action against its bank for wrongfully paying a check over a forged indorsement). The rationale is that "the balance in favor of a mechanical termination of liability of the bank outweighs what few residuary risks the customer may still have." 13 Pa.Cons.Stat.Ann. §4406 cmt. 5. Here too, in a conversion claim against a party not engaging in fraudulent concealment, the policies of finality and certainty are best achieved by applying the statute of limitations without the discovery rule exception. [*Menichini, supra,* 995 F2d 1231 (case citations omitted).]

Michigan National and First of America also rely on *ICNA, supra*, 127 Mich App 278. In *ICNA*, the Anchor National Life Insurance Company (ANLIC) made an insurance claim through *ICNA* for a loss after Manufacturers Bank cashed certain checks forged by an ANLIC employee. The Court concluded that the plaintiff's claim was one for injury to property and that a three-year statute of limitations applied. *Id*. at 281-283. Moreover, the Court specifically rejected the discovery rule, stating:

> Plaintiffs' final argument is that even if this case involves an injury to property, accelerated judgment should not have been granted because the suit was started less than three years after the forgery was discovered. Plaintiffs' argument is meritless because the period of limitation begins to run when the checks are paid on the forged indorsement, not when the forgery is discovered. Application of a date of discovery rule to actions by a payee to recover for payment on a forged indorsement would frustrate the strong public policy of finality in commercial transactions. [*ICNA, supra*, 127 Mich App 283-284 (citations omitted).]

Indeed, it appears that "the vast majority of authority runs strongly against applying the discovery rule to an action for conversion of negotiable instruments in the absence of fraudulent concealment on the part of the defendant asserting the defense of the statute of limitations." *Haddad's of Illinois, Inc v Credit Union 1 Credit Union*, 286 Ill App 3d 1069, 1073-1074; 678 NE2d 322 (1997), citing, among others, *Menichini*, *supra*, and *Continental Casualty*, *supra*. Consistent with the majority view and *Brennan*, we hold that, here, the statute of limitations began to run when Ketslakh deposited the check in the KO Distributors account on August 9, 1993.

Plaintiff argues that the reasoning of *ICNA* and *Menichini* should not apply because, as a remitter, he had less opportunity to discover that the check was wrongly paid. He also argues that equity requires that this Court adopt a discovery rule under the facts of this case. However, the principals articulated in the above cases apply equally to plaintiff's claims against Michigan National and First of America. Regardless of a plaintiff's ignorance of a forged or fraudulently cashed check, principles of finality and negotiability override whatever equitable principles a discovery rule may provide a plaintiff in circumstances such as those in this case.

Giving plaintiff's claim the benefit of the doubt, that he did not know the check was cashed by Ketslakh/KO Distributors until March 24, 1997, it remains clear that plaintiff's own negligence contributed to his loss. There is no dispute that the named payee on the check was Baker's Choice and that Ketslakh deposited the check into a KO Distributors account. However, plaintiff admits that he purchased the check according to Ketslakh's instructions, he delivered the check to Ketslakh and he endorsed the back of the check at Ketslakh's request.

Clearly plaintiff's endorsement, as the remitter of the check, could be interpreted as an intent to sign over the check to Ketslakh. After all, plaintiff's contract was with Ketslakh/KO and the contract provided that plaintiff would pay $20,000 for the delivery route. Therefore, according to the plain terms of the agreement, plaintiff knew or should have known that Ketslakh would cash the check or that the money was intended for Ketslakh/KO. Moreover, plaintiff believed Ketslakh was an agent of Baker's Choice and, therefore, plaintiff would logically have been aware that Ketslakh would cash a check made out to Baker's Choice. Finally, plaintiff

learned as early as June 1994 that Ketslakh left town and that others were delivering Baker's Choice products in his territory. This suggests that plaintiff knew, should have known, or should have discovered at that time that the check did not go to Baker's Choice to secure his exclusive route.

In sum, plaintiff's claim against Michigan National and First of America is governed by a three-year statute of limitations that began to run when Ketslakh deposited the check into the KO Distributors account August 9, 1993. Plaintiff did not file his claim against Michigan National and First of America until April 21, 1997, more than three years later. Accordingly, the trial court properly granted summary disposition under MCR 2.116(C)(7) on statute of limitations grounds.

B. Plaintiff's Claims Against MFCU

For the above reasons, the trial court should have granted MFCU's motion for summary disposition on statute of limitations grounds.

The trial court stated that it denied MFCU's first motion for summary disposition because, although it was brought on statute of limitations grounds, the judge believed MFCU, as the drawer of the check, had a greater responsibility to assure it would be properly cashed. Thus, the trial court decided the motion based on his opinion of MFCU's ultimate culpability, rather than on statute of limitations grounds pursuant to MCR 2.116(C)(7).

First, we are not persuaded by plaintiff's claim that his action against MFCU sounds in contract.[11] Plaintiff cites cases, including *Benge, supra*, that hold that a depositor and his bank have a contractual relationship. Plaintiff had an account at MFCU and, therefore, was a "depositor" there. However, the transaction here involved a teller's check, not a check drawn on plaintiff's account by MFCU. When a teller's check is cashed, it is drawn on the seller's account, not on plaintiff's deposit or checking account. Because the check was not cashed at MFCU, it was not within MFCU's control to verify the endorsement when it was presented for deposit by Ketslakh. MFCU did not pay the check from plaintiff's account, it issued it from plaintiff's account, at plaintiff's request, essentially as a cash equivalent.

Plaintiff has not presented any evidence that MFCU did anything contrary to his order to support a claim for breach of contract. Even if a contractual relationship existed between plaintiff as a depositor and MFCU, no evidence shows that MFCU paid any funds from plaintiff's account without his authorization. MFCU issued the check according to plaintiff's request and did not negotiate the check thereafter.

Regardless, plaintiff's claim against MFCU, like his claims against defendant banks, is for injury to property and, whether plaintiff characterizes the claim as conversion or an implied contract action, the statute of limitations is three years from the date the check is cashed, absent

[11] Plaintiff also contends on appeal that the trial court erred by granting MFCU's motion for summary disposition on his contract claim because MFCU allowed payment on the teller's check to someone other than the named payee.

an express contract between the parties. See MCL 600.5805(8); *Continental, supra, ICNA, supra*, and *Menichini, supra*.

Even if plaintiff could show some greater contractual obligation by MFCU to assure the check would be properly paid, the statute of limitations would preclude recovery for the reasons articulated above. The check was cashed on August 9, 1993, and plaintiff filed his complaint against MFCU on April 21, 1997, and therefore, the trial court should have granted MFCU's motion for summary disposition because plaintiff's claim is time barred. Accordingly, we reverse the trial court's denial of MFCU's motion for summary disposition under MCR 2.116(C)(7).

C. Plaintiff's 1998 Case

The trial court also properly granted summary disposition to defendants on statute of limitations grounds in plaintiff's 1998 case. Plaintiff contends that the statute of limitations does not apply where plaintiff is the "current owner" of the $20,000 teller's check. Plaintiff further avers that title to the check was never transferred because the check was delivered to and cashed by Ketslakh, not the named payee. Accordingly, plaintiff maintains that he remains the true owner of the check and that his causes of action did not accrue until he demanded reimbursement from defendants in April 1997 and April 1998.

Plaintiff's 1998 complaint alleged conversion. As discussed in detail above, actions for conversion of a negotiable instrument are governed by a three-year statute of limitations which begins to run when the check is wrongly cashed. See MCL 600.5805(8); *Continental, supra* and *ICNA, supra*. Plaintiff's claim that title never transferred has no bearing on the statute of limitations because, as MFCU observes, a cause of action for conversion accrues when the defendant wrongfully exercises dominion or control over the property, not when a plaintiff demands its return. See *Davidson v Bugbee*, 227 Mich App 264, 269; 575 NW2d 574 (1997). Moreover, plaintiff has cited no authority to support the theory that repeated demands for reimbursement toll the statute or constitute new causes of action.[12] Accordingly, the trial court did not err in granting summary disposition to defendants on statute or limitations grounds in the 1998 case.

Affirmed in part, reversed in part and remanded for entry of an order granting summary disposition to MFCU.[13] We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ William B. Murphy
/s/ Henry William Saad

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[12] Furthermore, plaintiff's argument that he remained the owner of the check until delivery to named payee ignores the fact that he endorsed the check himself and delivered it to Ketslakh himself. Plaintiff's argument that no cause of action could accrue because of improper delivery, therefore, is disingenuous.

[13] Because the trial court properly dismissed plaintiff's 1998 case on statute of limitations grounds, we need not address MFCU's res judicata argument on appeal.